

# ARKANSAS SUPREME COURT

No. CR 86-206

HERBERT MALONE  
Petitioner

v.

STATE OF ARKANSAS  
Respondent

Opinion Delivered March 15, 2007

PRO SE PETITION TO REINVEST  
JURISDICTION IN THE TRIAL  
COURT TO CONSIDER A PETITION  
FOR WRIT OF ERROR CORAM  
NOBIS; PETITION TO REINVEST  
JURISDICTION IN THE TRIAL  
COURT TO CONSIDER A PETITION  
FOR WRIT OF ERROR CORAM  
NOBIS, OR IN THE ALTERNATIVE  
FOR LEAVE TO PROCEED IN TRIAL  
COURT WITH A PETITION  
PURSUANT TO CRIMINAL  
PROCEDURE RULE 37.1 [PULASKI  
COUNTY CIRCUIT COURT, CR 86-  
841]

PETITIONS DENIED.

## PER CURIAM

In 1986, a jury found petitioner Herbert Malone guilty of aggravated robbery, aggravated assault, and theft of property and sentenced him as a habitual offender to an aggregate term of 348 years' imprisonment. This court affirmed the judgment. *Malone v. State*, 292 Ark. 243, 729 S.W.2d 167 (1987). Petitioner sought postconviction relief under Ark. R. Crim. P. 37.1 and the petition was denied.<sup>1</sup> *Malone v. State*, 294 Ark. 127, 741 S.W.2d 246 (1987) (per curiam). Petitioner

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<sup>1</sup>Petitioners convicted and sentenced prior to July 1, 1989, are required to file a petition pursuant to Rule 37.1 in this court if the judgment was affirmed on appeal for leave to proceed in circuit court under the rule.

subsequently filed a pro se petition for writ of habeas corpus in Lincoln County Circuit Court, which was also denied. The appeal was dismissed. *Malone v. State*, CR 97-656 (Ark. Feb. 12, 1998) (per curiam). Proceeding pro se, petitioner now requests in two separate petitions that this court reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis.<sup>2</sup> A petition for leave to proceed in the trial court is necessary because the circuit court can entertain a petition for writ of error coram nobis after a judgment has been affirmed on appeal only after we grant permission. *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001) (per curiam).

In the first petition filed, petitioner asserts that the trial court should be reinvested with jurisdiction to consider a petition for the writ because petitioner's wife was permitted to testify at his trial pursuant to rules of evidence that were invalidated by this court's ruling in *Ricarte v. State*, 290 Ark. 100, 717 S.W.2d 488 (1986). Petitioner asserts that his wife was therefore not a competent witness and he should be granted a new trial because her testimony was admitted.

The function of the writ of error coram nobis is to secure relief from a judgment rendered while there existed some fact which would have prevented its rendition if it had been known to the trial court and which, through no negligence or fault of the defendant, was not brought forward before rendition of judgment. *Cloird v. State*, 357 Ark. 446, 182 S.W.3d 477 (2004). A writ of error coram nobis is an extraordinarily rare remedy, more known for its denial than its approval. *Larimore v. State*, 341 Ark. 397, 17 S.W.3d 87 (2000). The writ is allowed only under compelling circumstances to achieve justice and to address errors of the most fundamental nature. *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407 (1999) (per curiam).

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<sup>2</sup>For clerical purposes, the instant petition to reinvest jurisdiction in the trial court to consider a petition for writ of error *coram nobis* was assigned the same docket number as the direct appeal of the judgment.

We have held that a writ of error coram nobis was available to address certain errors that are found in one of four categories: insanity at the time of trial, a coerced guilty plea, material evidence withheld by the prosecutor, or a third-party confession to the crime during the time between conviction and appeal. *Id.* at 583, 986 S.W.2d at 409. For the writ to issue following the affirmance of a conviction, the petitioner must show a fundamental error of fact extrinsic to the record. *Larimore v. State*, 327 Ark. 271, 938 S.W.2d 818 (1997).

Here, petitioner does not argue an error of fact, but rather an error as to the correct application of law that he failed to bring to the trial court's attention. His claim does not fall within the recognized categories of error. A writ of error coram nobis is appropriate only when an issue was not addressed or could not have been addressed at trial because it was somehow hidden or unknown and would have prevented the rendition of the judgment had it been known to the trial court. *Echols v. State*, 360 Ark. 332, 201 S.W.3d 890 (2005); *Brown v. State*, 330 Ark. 627, 955 S.W.2d 901 (1997) (per curiam); *Penn v. State*, 282 Ark. 571, 574, 670 S.W.2d 426, 428 (1984) (citing *Troglin v. State*, 257 Ark. 644, 519 S.W.2d 740 (1975)). Appellant has clearly failed to present such an issue.

Moreover, even were petitioner's claims appropriate for relief, petitioner has not exercised due diligence as required to obtain relief. There is no specific time limit for seeking a writ of error coram nobis, but due diligence is required in making an application for relief and in the absence of a valid excuse for delay, the petition will be denied. *Echols*, 360 Ark. at 338, 201 S.W.3d 894. Due diligence requires that 1) the defendant be unaware of the fact at the time of trial; 2) he could not have, in the exercise of due diligence, presented the fact at trial; or 3) upon discovering the fact, did not delay bringing the petition. *Id.*

Petitioner does not allege any fact or ruling that was not known and available more than 20 years ago, at the time of his trial or shortly thereafter. A claim is not cognizable in a petition for writ of error coram nobis if it may be properly raised in a timely petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1 or on direct appeal. *See McArty v. State*, 335 Ark. 445, 983 S.W.2d 418 (1998) (per curiam). Petitioner did raise this issue in his petition for Rule 37.1 relief, alleging ineffective assistance of counsel for failure to bring the issue to the attention of the trial court. He cannot once again raise the argument as a basis for relief under a writ of error coram nobis.

Petitioner has made no showing of diligence in pursuing a claim cognizable in a proceeding for error coram nobis as grounds for relief. Accordingly, we decline to reinvest the trial court with jurisdiction to consider the petition for writ of error coram nobis.

In the second petition, petitioner contends that he was subjected to double jeopardy. The argument is not entirely clear, but it appears that petitioner is claiming that the jury was required to find the elements of robbery in order to find that he was guilty of aggravated robbery and thus the felony information and the jury instructions should have covered simple robbery as well as aggravated robbery. While robbery is generally a lesser-included offense of aggravated robbery, petitioner offers nothing to demonstrate that it was a violation of any specific statutory or constitutional provision for the State to charge him with only aggravated robbery. The argument does not constitute grounds to reinvest the trial court with jurisdiction to consider a petition for writ of error coram nobis.

In the second petition, petitioner also makes an alternative request that this court grant leave for him to file a petition in the trial court for postconviction relief pursuant to Rule 37.1. Under the

rule, as it was in effect when petitioner was convicted, petitions must be filed within three years of the date the judgment was entered, unless there is some ground sufficient to void the judgment absolutely. *Prince v. State*, 315 Ark. 492, 868 S.W.2d 77 (1994) (per curiam). An issue sufficient to void a judgment absolutely must be an issue that will render the judgment a nullity such as a lack of jurisdiction to try the petitioner. *Travis v. State*, 286 Ark. 26, 688 S.W.2d 935 (1985).

Here, as grounds to proceed under Rule 37.1, petitioner argues only that he was subjected to double jeopardy by not being charged with simple robbery as well as aggravated robbery. The allegation is not well founded and does not demonstrate that the judgment is void.

Moreover, as we noted initially, petitioner previously filed a petition for postconviction relief under Rule 37.1, which was denied. Rule 37.2(b) specifically prohibits the filing of a subsequent petition unless the first was denied without prejudice to filing a second petition. Petitioner's original petition was not denied without prejudice, and he is not entitled to file a second Rule 37.1 petition.

Petitions denied.